standard rent of the premises is $750 per mensem. Since 1st April 1953 the plaintiffs have received from the defendant $1,300 per mensem as rent and from 1st April 1958 they have received $1,400 per mensem. These rents were fixed by agreement between the parties and were stated to be subject to their being sanctioned by the Rent Conciliation Board. The plaintiffs never made the necessary application to the Rent Conciliation Board with the result that the rent which they have been receiving included an unauthorised increase. The defendant now counter-claims from the plaintiffs the excess rent that she has paid to them since 1953. It was clearly within the contemplation of the parties that the premises were subject to the Ordinance and as the rent was increased from $750 to $1,300 and later to $1,400 without the sanction of the Rent Conciliation Board the defendant is entitled to recover the excess rent paid by her to the plaintiffs.

The plaintiffs have pleaded the Limitation Ordinance. The defendant concedes that the Limitation Ordinance is applicable and that all she is entitled to is the excess rent she paid in respect of the six years immediately prior to the date of the writ in these proceedings. The writ was issued on 8th April 1961. The defendant maintains that she is entitled to recover the excess rent she paid for the period of six years from 8th April 1955 to the 7th April 1961.

In my view the defendant being a trespasser as from 1st April 1961, she is not entitled to claim the excess rent she paid for any period after that date because all such rent is to be set off against the *mesne* profits she has to pay to the plaintiffs. She is therefore entitled to a refund of the excess rent she paid for the period 8th April 1955 to 31st March 1961 which amounts to $43,071.66 as follows:

Excess rent at $550 p.m. from 8.4.55 to 31.3.58	$19,671.66
Excess rent at $650 p.m. from 1.4.58 to 31.3.61	$23,400.00
	$43,071.66

There shall be judgment for the defendant on the counter-claim for $43,071.66. I order the defendant to pay the plaintiffs' costs of the claim and the plaintiffs to pay the defendant's costs of the counter-claim.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Drew & Napier.*

GOVERNMENT OF MALAYSIA & ANOR. v. KONG EE KIM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) November 10, 1964]

[Ipoh — Federal Court Civil Appeal No. 67 of 1964]

Negligence — Injury to trespasser on village road — State land — Whether trespasser entitled to damages.

Trespass — Trespasser on State land — Injury caused by servant of Federal Government — Damages.

While the respondent a housewife was engaged in depasturing her chickens on a macadamised village road in a squatting position, behind a bush, a caterpillar motor grader which was being used to level and clear land near the village road was partly driven off the vacant land on to the village road and came in contact with her leg as a result of which the respondent suffered severe injuries to her leg. The grader was driven at the material time by one P an employee of the appellant Government and he was assisted by one N who was supposed to warn people who might be in the grader's path.

The respondent sued P and the appellant Government. On the pleadings it was admitted that the village road and the neighbouring land was State land of which the appellant Government had no right, title or interest nor was occupier thereof. The trial judge held that there was negligence on the part of P, that the respondent was a trespasser and that nevertheless P and his employers were still liable, but that as the respondent was guilty of contributory negligence (which was assessed at 50%) general and special damages should be fixed at $10,000 and $500 respectively and awarded the respondent $5,250.00. On appeal it was argued that the trial judge having found that the respondent was a trespasser proceeded to examine the appellants' liability in the light of the test of foreseeability as adopted by the English Court of Appeal in *Videan* v. *British Transport Commission* (1) instead of that adopted by the Privy Council in *Commissioner for Railways* v. *Quinlan.* (2)

Held: (1) although *Quinlan's* case is binding on the court if applicable, it was not applicable in this case because this case differed from the Privy Council case in two material particulars namely, firstly, the respondent was not a trespasser *vis-a-vis* the appellant Government as the village road was State land and secondly the respondent's trespass on the land arose not by reason of having introduced her physical person on the land but by reason of what she was doing on the land with her physical person;

(2) on a highway the possibility of pedestrians and other persons must always be assumed and every user of a highway owes a duty of care to all other users and he violates that duty if he does an act without reasonable care which injures any other user. In this case P had a duty to forsee the possibility of the physical presence of a person behind a bush and the question of whether that person was doing something lawful or unlawful was irrelevant to that duty;

(3) although the degree of contributory negligence on the part of the respondent was much greater than that imputed to be by the trial judge, that part of the decision had not been appealed against and the appeal should be dismissed with costs.

Cases referred to:—

(1) *Videan* v. *British Transport Commission* [1963] 2 Q.B. 650.

(2) *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054.

(3) *Donoghue* v. *Stevenson* [1932] A.C. 562.

(4) *Harrison* v. *Duke fo Rutland* [1893] 1 Q.B. 142 at p. 146.

(5) *Stevens* v. *Whistler*, 11 East 51.

(6) *Fielden* v. *Cox*, 22 T.L.R. 411.

(7) *Lynch* v. *Nurdin* (1841) 1 Q.B. 29 at p. 37.

(8) *Bird* v. *Holbrook*, 4 Bing 628.

(9) *Buckland* v. *Guidford Gas Light & Coke Co.* [1949] 1 K.B. 410 at p. 420.

(10) *Hay* v. *Young* [1943] A.C. 92.

(11) *Davies* v. *Mann*, 10 M. & W. 546.

(12) *Farrugia* v. *Great Western Railway Co.* [1947] 2 All E.R. 565.

FEDERAL COURT.

Au Ah Wah (Federal Counsel) for the appellants.

A. Jayadeva for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This litigation arises out of an incident which occurred on 20th January, 1962, at a place called the Sungei Dua Resettlement in the State of Penang which is just off the main road from Georgetown to the Bayan Lepas Airport.

From the plan and the photographs which are in evidence it would appear that most of this area has been divided into residential plots, each of about 1/8 acre, many of which are built upon. The plaintiff, who is a married woman of 23 years of age, lives on one of these plots with her husband, her children and her mother.

On the plan the plots are divided by a strip of land sixty feet wide running roughly east and west which leads to the main Georgetown road and the photographs shew that the centre of this strip is macadamised. It is clear that this strip represents a road of the usual type in this country, that is to say a strip of land which in the centre is macadamised but which on the sides is not macadamised. On the pleadings it is admitted that this land (which I shall call the "village road") and the neighbouring land is State land and it is not averred that the Federal Government has any right title or interest in it, or on the material date was even the occupier of it.

On 20th January, 1962, some of the land at Sungei Dua was being levelled and cleared of undergrowth for the purpose of erecting buildings. The work was being done by functionaries of the Federal Government and for the purpose they were using a mechanically-propelled peripatetic contraption called a caterpillar motor grader. This thing, which is becoming a regrettably frequent feature of the local landscape, is a large heavy machine mounted on six wheels and is driven by an internal combustion engine which emits a very loud and unpleasant noise. It carries a heavy steel blade which it forces on to the earth's surface by its own weight and then drags along by its powers of traction thereby smoothing out everything that may lie in its path.

On the day in question this grader, if I may so call it without undue familiarity, was being operated by a Mr. Perkins, an employee of the Central Government, and he was assisted by one Noordin bin Kachay who cleaned the machine and was also supposed to warn people who might be in its path, particularly when it was moving backwards, when the driver's vision was not very good. It was being operated on a small piece of unoccupied land near the plaintiff's house in the angle between the main road and the village road.

About 8 a.m. the plaintiff proceeded from her house to the village road accompanied by some twenty small chickens and her intention was to depasture the chickens. In pursuance of this intention she walked along the road till she came to a spot where there was a nest of termites and she then squatted down and proceeded to feed her chickens with the termites. On the evidence, and the trial judge so found, there is no doubt whatsoever as to where she squatted down. It was at a spot on the road between the macadamised portion and the north edge of the road itself. Between her and where the grader was working there was a large shrub, which was still on the road, and just off the road beyond the shrub there was a small wayside shrine.

While the plaintiff was thus engaged on this spot a portion of the grader was driven off the vacant land on to the road and came in contact with her leg causing her severe injuries in consequence of which she was in hospital for some seven months and will suffer some disability and discomfort for the rest of her life.

In these circumstances the plaintiff sued Mr. Perkins and the Government of what was then the Federation of Malaya as Mr. Perkins' employers for damages in negligence. The defences were that there was no negligence on the part of Mr. Perkins; that at the time of the accident the plaintiff was a trespasser; and that in any event her injuries were entirely due to her own negligence. It was not denied that if Mr. Perkins was negligent the Federal Government were vicariously liable.

In the event Hepworth J. found that there was negligence on the part of Mr. Perkins; that at the material time and place the plaintiff was a trespasser; that nevertheless Mr. Perkins and his employers were still liable; but that there was contributory negligence on the part of the plaintiff which he assessed at 50%. He assessed the damages at $10,000 general damages and

$500 special damages. Judgment was accordingly entered for the plaintiff in the sum of $5,250 and costs.

Against that decision the defendants have now appealed.

The main ground of appeal, and indeed it was the only one which was very strenously argued, was that the trial judge, having found that at the material time and place the plaintiff was a trespasser, proceeded to examine the defendants' liability in the light of the test of foreseeability as adopted by the English Court of Appeal in the case of *Videan* v. *British Transport Commission.*[1]

This, it was said, was wrong by reason of the Privy Council case of *Commissioner for Railways* v. *Quinlan* [2] where it was said (*per* Lord Radcliffe at p. 1085):—

> "Their lordships have studied with care and respect the judgments of the members of the Court of Appeal in England in *Videan* v. *British Transport Commission*, ...but they remain quite unpersuaded that the measure of an occupier's duty to a trespasser can be determined in all cases by what is called the foreseeability test or that it is correct to describe the nature of the duty by saying that if the circumstances are such that the occupier 'ought to foresee' even the presence of a trespasser, the duty of care extends to the trespasser also."

They went on:—

> "the situation would be less liable to be misunderstood if it were explained that the only trespasser to whom the occupier is accountable for his actions, even if dangerous, is one of whose presence he actually knows or one whose presence at the time of injury can fairly be described as extremely likely or very probable."

In short and generally speaking an occupier of land while doing things on his own land owes a duty of care towards trespassers only if their presence is not only foreseeable but "can fairly be described as extremely likely or very probable."

The law as stated in *Quinlan's* case is binding on this court and if it is applicable to the facts of the present case then the present case was wrongly decided and the appeal must succeed.

But is it applicable?

Quinlan's case arose out of a collision between a railway train which was proceeding along the land of which the appellant was the occupier and a lorry which was in the act of passing over that land. The lorry (or at any rate the driver) was a trespasser because there was no right or licence for it to be on the land. It was a clear case of a claim based on misfeasance on his land by an occupier of land. What their Lordships were concerned with was the law as stated to the jury by the trial judge in relation to such a case. This was thus stated by Lord Radcliffe (at p. 1069):—

> "the jury must have received the definite impression that the law that they were to apply to the facts was that, once they thought that there was 'a likelihood' of people coming to the crossing and that the appellant was aware of such a likelihood, the appellant owed a general duty to the respondent as 'a member of the public' to take reasonable precautions to secure his safety, and that this duty was not affected by the fact that the respondent was a trespasser."

Reference was then made to the well-known case of *Donoghue* v. *Stevenson* [3] and it was said that no general principle could be deduced from the decision in that case that throws any particular light on the legal rights and duties that arise "when a trespasser is injured on a railway level crossing where he has no right to be".

The present case differs from *Quinlan's* case in two very material respects.

In the first place, the plaintiff when she was injured may have been a trespasser *vis-a-vis* the State of Penang but she was certainly not a trespasser *vis-a-vis* the Federal Government who by their servants were using the grader. They were not the owners of the village road nor were they the occupiers of it in the sense of having any exclusive right to its user either by themselves or jointly with anybody else. Indeed there is no evidence to shew they had any more extensive rights in relation to the village road than had any member of the public. In *Quinlan's* case, if the law in Australia is the same as here, the commissioner for railways could have brought an action for trespass against Quinlan, *quare clausum freight.* In the present case, however, the Federal Government could not have successfully maintained such an action against the plaintiff in view of the admission on the pleadings that the land was State land and the lack of any averment that they were occupiers in any sense whatever, far less any sense that would enable them to sue.

In the second place, the plaintiff's trespass on the land arose not by reason of having introduced her physical person on to the land but by reason of what she was doing on the land with her physical person. A member of the public has a right of passage along the highway for the purpose of getting from one place to another and that includes a right to do what is reasonably connected with that right of passage. As was said by Lord Esher M.R. in the case of *Harrison* v. *Duke of Rutland*:— [4]

> "Highways are, no doubt, dedicated *prima facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

It is not necessary here to exegise that passage in any great detail by quoting examples of acts which the courts have held to be reasonable

modes of using a highway as such. In England, however, it is a trespass to depasture cattle on the highway (*Stevens* v. *Whistler* [5]). That may or may not be the law in this country. If it is, it is not very well known to the vast majority of local cattle owners. Again, it has been held that catching moths on the highway is a trespass (*Fielden* v. *Cox* [6]), although a very trifling one. I do not decide the point but for the purposes of the present case I assume that depasturing chickens on the highway, the pasture consisting not of grass but of white ants, is a trespass. On that assumption it was the plaintiff's object in depasturing her chickens on the highway and not her physical presence there that constituted her a trespasser. If she had been on her way to the main road to catch a bus and had sat down under the bush to rest herself a little or had she squatted down to repair a broken sandal there would have been no trespass.

It is now important to observe the basis of the rule that a trespasser on land who suffers injury as a result of the activities of the occupier of the land is in a less favourable position than is a person who is lawfully on the land, that the duty of an occupier of land towards a trespasser is much narrower than is his duty towards an invitee or a licensee.

The reason for the distinction is clear. It has nothing to do with the action of the injured person in committing the trespass. It is not that a trespasser is a wicked person who is to be penalised for his act by losing a measure of protection which he would otherwise enjoy. As was said by Lord Denman C.J. in the case of *Lynch* v. *Nurdin*:— [7]

> "*Bird* v. *Holbrook* [8], is a decisive authority against the general proposition that misconduct, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue."

Or as is said in *Salmond* on Torts (12th Ed. at p. 516) a trespasser is not "*caput lupinum* to be treated as the occupier pleases". Indeed, if this were not so it would be difficult to imagine that a trespasser was entitled to any protection at all even against acts of the most gross negligence committed by the occupier in the full knowledge of his presence.

The true reason for the distinction is stated in the following passage from the judgment of Denning L.J. in *Videan* v. *British Transport Commission, supra,* (at p. 665) :—

> "'In the ordinary way the duty to use reasonable care extends to all persons lawfully on the land, but it does not extend to trespassers, for the simple reason that he cannot ordinarily be expected to foresee the presence of a trespasser."

Or as was said by Morris J. in the case of *Buckland* v. *Guildford Gas Light and Coke Co.*:— [9]

> "Broadly speaking, those whose presence the defendants ought to contemplate would doubtless be persons who were lawfully present on the land. Under most conditions the defendants would be entitled to assume that persons would not go unlawfully on land and would not be under obligation to provide against the contingency of persons trespassing."

The point is thus summarised by Lord Russell of Killowen in the case of *Hay* v. *Young* [10] (at p. 101) :

> "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man."

And in the same case it was said by Lord Wright (at p. 107) :—

> "negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. It is a concrete, not an abstract, idea. It has to be fitted to the facts of the particular case."

In other words unless it is extremely likely or very probable that trespassers will come upon his land a land owner is entitled to do what he likes on his own property because he is entitled to assume that other people will respect his lawful rights and refrain from trespassing. He knows (or is presumed to know) what persons are lawfully entitled to be on his land, his invitees and his licensees, and he is entitled to act on the assumption that others will not be physically present. Thus in *Quinlan's* case the commissioner for railways was entitled to conduct his activities on the assumption that trespassers would not be physically present on his railway.

But on a highway the position is entirely different. The possibility of the physical presence of pedestrians and other persons must always be assumed. Moreover the physical attributes of presence are the same in the case of the licensee and the trespasser. If the plaintiff had sued for injury to her chickens (as to whose fate the evidence is silent) it could of course be said that there was no duty on Mr. Perkins to foresee the possibility of their presence behind the bush. But I think he had a duty to foresee the possibility of the physical presence of a person behind the bush and the question of whether that person was doing something lawful or unlawful was irrelevant to that duty.

On the photographs and on the undisputed evidence Mr. Perkins was bringing his employers' grader on to the highway; and it is clear that he was bringing it on to a portion of the highway which by reason of the construction of his implement and size and the situation of the bush he could not see and that neither he nor his assistant took any precautions to see whether anybody was there. If that is not negligence, particularly when the portion of the road in

question is in effect a village street, I do not know what is.

The true principle applicable here is that every user of a highway owes a duty of care to all other users and he violates that duty if he does an act without reasonable care which injures any other user. I know of no authority to support the view that those duties owed to each other by users of a highway are in any way modified by the fact that the person who has suffered injury is a trespasser.

Indeed the weight of authority is the other way.

First there is the old case of *Davies* v. *Mann.*[11]

In that case the plaintiff hobbled an ass and turned it loose on the highway. In doing so he was clearly committing a trespass on the highway. The defendant's wagon which was being driven along the highway collided with the ass and it was held that if the wagon was being driven negligently then the defendant was liable. Lord Abinger C.B. said (at p. 548):—

"The defendant has not denied that the ass was lawfully on the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."

Parke B. said this:—

"the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief."

Much the same thing was said a hundred years later in the case of *Farrugia* v. *Great Western Railway Co.*[12]

In that case the plaintiff claimed damages for personal injuries sustained by him as a result of the negligence of the defendants' servant, a lorry driver, in attempting to drive under a railway bridge with his lorry so loaded that he could not clear the bridge. As a result of this a large box was thrown off the lorry on to the roadway and fell on the plaintiff injuring him. Shortly before the accident the plaintiff had been on the lorry as a trespasser but he had just got off and was running behind it. The defendants contended that they owed no duty of care to him because he was using the road for an unlawful purpose in that he was about to steal a second ride on the lorry.

It was held that the plaintiff was lawfully on the highway and the defendants owed him a duty of care.

In the Court of Appeal it was said that the question of whether or not the plaintiff was a trespasser was in effect irrelevant. Lord Greene M.R. said (at p. 567):—

"Even if it be the fact — and I am not saying it is — that when the plaintiff was running along the road, he was doing something in respect of which the owner of the soil of the highway could have maintained an action for trespass against him, it appears to me that that is a long way away from discharging the defendants from their liability to take care towards him."

Later he said:—

"It appears to me that the defendants and their driver, having created between them a potential source of danger which would impinge on anybody on the highway in the near neighbourhood, must be taken to have owed a duty towards anybody who might be on the highway in the near neighbourhood, whether he was there lawfully or whether he was there unlawfully. I cannot see, on any ground of principle or common sense, why a distinction should be made between the plaintiff running in the road to get on the lorry and a foot passenger lawfully crossing the road immediately behind the lorry. I should have thought the duty was a duty to take care *vis-a-vis* anyone — not this plaintiff as such, but anyone — the general class of persons who, at the moment when the danger materialised, might happen to be in the near neighbourhood."

These observations of Lord Greene are very apposite here and fortify me in the view that the law as stated in *Quinlan's* case is not applicable in the present case and that, apart from any question of contributory negligence, the plaintiff is entitled to damages. For myself I should have said that the degree of contributory negligence on her part was much greater than that imputed to her by the trial judge. Perhaps, however, I am unduly sensitive to noise and, in any event, that part of the decision has not been appealed against.

I would dismiss the appeal with costs.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: *Jayadeva, Zahir & Ismi.*

LIM SING HIAW v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ismail Khan J.) December 29, 1964]

[K.L. — Federal Court Criminal Appeal No. 76 of 1964]

Emergency Criminal Trial — Internal Security Act, 1960, ss. 57(1), 58(1) and 75 — Having under control a firearm — Consorting — Emergency (Criminal Trials) Regulations, 1964, reg. 4 — Validity of — Retrospective effect of changes in procedure.

Criminal Procedure — Joinder of charges — Discretion.